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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

KERRI ANN PELTIER, A Minor, etc., Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.	C064499 (Super. Ct. No. 72988)

An inattentive motorist (who is not party to this appeal) struck a 14-year-old bicyclist, plaintiff Kerri Ann Peltier, in a crosswalk on State Route 36 (SR 36) in Plumas County. Plaintiff, a minor suing through her mother Lorri Shafer, as guardian ad litem, alleges that a dangerous condition of public property (Gov. Code, § 835)[1] makes defendant California Department of Transportation (the State) liable for her

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[1] Undesignated statutory references are to the Government Code.

injuries. Plaintiff appeals from summary judgment entered in favor of the State, arguing the trial court improperly excluded expert opinion, ruled that prior accidents were not relevant unless similar, and ruled that negligence by any user of public property defeats a claim of dangerous condition of public property.

We conclude plaintiff fails to show evidentiary error and misconstrues the trial court's ruling, which applied the law correctly. The trial court did not err when it found no triable issues of material fact as to the existence of a dangerous condition.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a personal injury complaint against the State (and others who are not parties to this appeal),[2] alleging that plaintiff, while riding her bicycle southbound in a crosswalk on SR 36 just east of the intersection of SR 36 with Aspen Street and Martin Way, was hit by a motor vehicle traveling eastbound on SR 36.[3] Plaintiff alleged the motorist who struck her, James Davis Branch, was distracted by a logging truck that had pulled out of a gas station at the intersection of Aspen Street/Martin Way/SR 36 and was blocking the entrance

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[2] The complaint also named as defendants Plumas County, David Branch, Jennifer Bailey, Doe Logging Truck Driver, and Doe Logging Truck Company.

[3] A diagram is attached as Appendix A.

to Aspen Street, and a pickup truck that turned from SR 36 onto Aspen Street and/or the gas station premises.

The only claim alleged against the State was the second cause of action for dangerous condition of public property. The complaint alleged SR 36, owned and controlled by the State, was in a dangerous and defective condition that created a substantial risk of injury when used with due care in a manner reasonably intended and foreseeable, in that the intersection of SR 36 with county roads Aspen Street and Martin Way, "is too busy and confusing, is without any traffic lights, and near a school and crosswalk; said crosswalk was dangerously and defectively maintained in that the markings were worn down and not visible, nor were high visibility markings used on the crosswalk; further the lighting and visibility of the crosswalk was poor." Plaintiff alleged that the State knew the intersection was dangerous given the traffic volume and the existence of the school, gas station and crosswalk at or near the area of the intersection. Plaintiff alleged the State had exclusive control and management of the crosswalk and roadway/intersection, created the dangerous condition, and/or had notice of it before this accident. Plaintiff alleged the State had prior notice of "previous similar collisions in the same general vicinity due to the defective condition." Plaintiff alleged the State's negligence caused her injuries, including permanent disability.

The State moved for summary judgment or, in the alternative, summary adjudication, on the *sole* ground that

the undisputed facts showed no dangerous condition of the State's property.

The State submitted a separate statement of undisputed facts, most of which, according to plaintiff's response, are undisputed. The State's separate statement stated the following:

On October 10, 2006, around 4:55 p.m., plaintiff was riding her bicycle southbound across SR 36, a highway that runs east/west, when she was struck by motorist James Branch, who was driving eastbound in the number two (slow) lane of SR 36. It was daylight; the weather was clear; and the road was dry. There is no stoplight at the intersection. Plaintiff was in a marked school crosswalk close to the northeast edge of the highway's intersection with Aspen Street, a county road.[4] The highway in this area is straight and flat, with nearly unlimited sight distance. The speed limit is 30 miles per hour. The words "SLOW SCHOOL XING" are painted on the road approaching the crosswalk in yellow letters eight feet in length. A mast arm extends above the road bearing a yellow "Advance School"

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[4] Plaintiff's response to the State's separate statement of undisputed facts admitted only that the accident occurred at that location, not that Aspen Street is a county road. However, plaintiff offered no evidence refuting defendant's evidence that Aspen Street is a county road. To the contrary, plaintiff submitted her own separate statement of undisputed facts, stating, "The County of Plumas owns and controls Aspen Street and Martin Way at the subject intersection," which the State agreed was undisputed. Moreover, plaintiff's complaint, in a cause of action against Plumas County, alleged Aspen Street and Martin Way are county roads.

symbol sign, and a yellow "School Crosswalk" warning sign was posted at the crosswalk.[5]

Immediately before the collision, nothing was blocking Branch's view of the crosswalk. However, his attention was not focused on the road ahead because he was distracted with what he believed to be a potential accident involving a logging truck and a pickup truck on Aspen Street.[6] By the time Branch directed his attention to the road ahead, it was too late, and he hit plaintiff.

Before the accident, Jeff Bruns was driving a vehicle six to eight car lengths behind Branch. Bruns saw plaintiff riding her bike across the crosswalk; nothing blocked his view of her or the crosswalk. Plaintiff did not dispute these facts but objected that they were irrelevant.

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[5] Plaintiff objected to terms ("sight" "approaching," and "distance") as vague and overbroad, but otherwise agreed the matters were undisputed.

[6] This statement appears multiple times in defendant's separate statement of undisputed facts; when the statement was first made, plaintiff responded, "Undisputed." The second time the statement was made, she responded, "Disputed." In both instances, she referred to her own statement of undisputed facts No. 19, which cited that portion of Branch's deposition testimony in which he stated that he believed there were going to be two accidents. Branch was concerned that the logging truck, which had pulled out of a gas station and was blocking Aspen Street, might pull out onto eastbound SR 36 in front of him. Branch also thought a pickup truck driven by Stephen Graffweg, which had turned left from westbound SR 36 onto Aspen Street, would hit the logging truck and then the gas pumps at the station. Defendant objected on relevance grounds.

The State submitted evidence (disputed by plaintiff) that between 1998 (the earliest date available on the State's database) and this 2006 accident, no other pedestrian or bicycle accidents had occurred at or near this crosswalk. The State's expert traffic engineer, Richard N. Smith, attested that during that time, over 16 million vehicles drove through the subject location; there were no other bicycle, pedestrian, or dismounted pedestrian accidents at or near the subject crosswalk; and the location complied with standards of the California Manual on Uniform Traffic Control Devices. Smith opined the intersection did not create a substantial risk of injury when used with due care.

Plaintiff objected to Smith's declaration insofar as it stated that the location of the accident was postmile 8.49, contending it had occurred at postmile 8.48. She also contended Smith's declaration lacked foundation because he based his calculation of the number of cars passing the intersection on a broader stretch of roadway (postmiles 8.08 to 8.84, with no particularity as to whether the 16 million vehicles actually went through the subject intersection).

Plaintiff also filed an opposition to the State's motion for summary judgment and her own separate statement of undisputed facts, asserting that between March 5, 1997 and April 9, 2005, there were 13 traffic collision reports at the subject intersection, of which two involved a pedestrian and one involved a bicyclist; state traffic surveys and accident analyses showed a higher than average incidence of accidents

between SR 36 postmiles 8.33 and 9.18 (which includes the Aspen Street intersection at SR 36 postmile 8.48); motorists and the County viewed the intersection as dangerous; and the County and State had discussed safety improvements.

Plaintiff submitted a declaration from her own retained expert traffic engineer, Harry J. Krueper, Jr., who opined that "high traffic volume, of which the State of California is aware, creates a dangerous condition and demands a high proportion of drivers' attention," and the angles at which Aspen and Martin join SR 36 do not provide drivers with as much visibility of cross-traffic as is provided at conventional right-angle intersections.

The State filed a reply, a response to plaintiff's separate statement of undisputed facts, and objections to plaintiff's evidence.[7] The State argued that "[o]nly substantially similar accidents are relevant," and plaintiff's evidence failed to show such accidents. The State's expert submitted a supplemental declaration explaining (1) the center of the intersection is at postmile 8.48, whereas the crosswalk is at postmile 8.49; (2) the traffic accident surveys report every accident within 95 feet on either side of an intersection as being "at" the intersection such that reported accidents are not necessarily related to the subject crosswalk; and (3) the accidents cited by plaintiff's expert were not similar to the subject accident.

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[7] We need not address all of the State's 200 pages of evidentiary objections.

Most of the prior accidents did not involve a pedestrian or bicycle. The accidents cited by plaintiff included: a westbound rear-end collision between two motor vehicles; an eastbound vehicle that collided with a vehicle pulling out of Aspen Street onto SR 36; an eastbound vehicle turning onto Aspen Street that hit a vehicle pulling out of the gas station; a vehicle pulling out of a parking space on Aspen that hit a vehicle traveling on Aspen; an accident in which an eastbound vehicle and a westbound vehicle turning left collided; a vehicle turning onto Aspen that hit a car parked in five inches of snow; and a collision between an eastbound vehicle and a westbound vehicle that was turning left onto Martin Way.

The three accidents involving pedestrians or bicycles were also dissimilar. In an August 8, 2002 accident at the subject crosswalk, an eastbound vehicle stopped to allow a pedestrian to cross, and the vehicle was rear-ended by another eastbound vehicle traveling too fast. The pedestrian was not injured. On May 4, 2004, also at the subject crosswalk, a westbound motorist stopped for a pedestrian and was rear-ended by another westbound vehicle. While the pedestrian was on the south curb near the part of the crosswalk where plaintiff was struck, the westbound driver who stopped was on the opposite side of the street and was rear-ended there. In other words, the collision took place on the opposite side of SR 36 than the collision in this case. (See Appendix A.) Again, the pedestrian was not injured. And on July 28, 2001, a bicyclist riding eastbound on SR 36 was struck by a car backing out of a parking stall at an

intersection west of the intersection where plaintiff was struck.

The State's reply pointed out that visibility was not at issue in this accident because the motorist who hit plaintiff admitted he had a clear, unobstructed view of the crosswalk; he simply was not paying attention to where he was going.

The trial court sustained the State's objections to the declaration of plaintiff's expert insofar as he opined that the configuration of the intersection, businesses with a high volume of traffic, and the location of the crosswalk created a dangerous condition. In its written ruling granting summary judgment, the trial court said: "Although Plaintiff's expert goes to great lengths to discuss the configuration of the intersection, the amount of traffic generated there, the potential for congestion and 'pedestrian-related traffic interactions,' certain areas with limited visibility and other obstacles to visibility of both vehicles and pedestrians, increasing visibility of the crosswalk, and drivers' 'reduced opportunity to perceive and react to the crosswalk,' none of these issues has any genuine correlation with the subject accident. In her own response to Defendant's separate statement of facts, Plaintiff admits [original underscoring] that the accident [occurred] in daylight, clear and dry weather with no unusual conditions (UMF [undisputed material fact] 2); the road was straight, flat and had nearly unlimited sight distance (UMF 4); signage for the crosswalk included yellow letters painted on

the road, an overhead sign with beacons and another sign on the shoulder, and was in conformity with standards (UMF 3, 5-9); Defendant Branch's attention was not focused on his path of travel (UMF 13) and when he focused on the road ahead, it was too late to avoid hitting Plaintiff (UMF 14); nothing blocked Branch's view of the crosswalk or Plaintiff as she crossed the road (UMF 15); and that the driver behind Branch saw both Plaintiff and the crosswalk she was in before the accident occurred (UMF 17-18). As a result, Plaintiff's expert's declaration has little, if any, relevance, to the one issue raised by this motion but more importantly, even if admissible, the declaration is itself undermined by Plaintiff's own admissions in response to Defendant's separate statement of facts. Accordingly, this Court concludes it does not create a triable issue of material fact."

The trial court also concluded that plaintiff's evidence of prior accidents was inadmissible because it failed to show the requisite "substantial similarity," and even if this evidence was admissible, it was insufficient to establish a triable issue of material fact given the lack of similarity.

Plaintiff appeals from the ensuing judgment.

DISCUSSION

I. Standard of Review

A motion for summary judgment should be granted if the submitted papers show that "there is no triable issue as to any material fact," and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c,

subd. (c).) A defendant meets his burden of showing that a cause of action has no merit if he shows that one or more elements of the cause of action cannot be established, or that there is a complete defense. (*Id.*, § 437c, subd. (p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists. (*Ibid.*)

The burden of persuasion remains with the party moving for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 861.) When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true (*Aguilar*, *supra*, at p. 851), or the defendant must establish that an element of the claim cannot be established by presenting evidence that the plaintiff "does not possess, and cannot reasonably obtain, needed evidence" (*id.* at p. 854).

On appeal, we view the evidence in the light most favorable to the party opposing summary judgment. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1339 (*Lane*).) We review the record and the determination of the trial court de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) "'First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's

showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. . . .'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

Although our review of summary judgment is de novo, review is limited to issues adequately raised and supported in the appellant's brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

II. General Legal Principles of Liability

A governmental entity is not liable for any injury unless otherwise provided by statute. (§ 815.)

Section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the

injury to have taken measures to protect against the dangerous condition."

For purposes of liability under section 835, "'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) As this court has observed, there is no hard and fast rule as to what constitutes a dangerous condition, and "'each case must depend upon its own facts.' [Citation.] A dangerous condition of public property can come in several forms and may be based on an 'amalgam' of factors. [Citation.]" (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069 (*Salas*).)

Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

"With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper

manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)."'" (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 (*Sun*) [affirmed summary judgment in favor of city where third party motorist struck pedestrian in unmarked crosswalk].)

"'Whether property is in a dangerous condition often presents a question of fact, but summary judgment is appropriate if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that no reasonable person would conclude the condition created a substantial risk of injury when such property is used with due care in a manner which is reasonably foreseeable that it would be used.' [Citation.]" (*Lane*, *supra*, 183 Cal.App.4th at p. 1344; accord, *Sun*, *supra*, 166 Cal.App.4th at p. 1183; see also *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148 (*Bonanno*) [whether a condition is dangerous may be resolved as question of law if reasonable minds can come to but one conclusion].)

Under section 830.2, trial and appellate courts have a statutory responsibility to determine whether, as a matter of law, a given defect constitutes a dangerous condition. "'This is to guarantee that [government entities] do not

become insurers against the injuries arising from trivial defects.' [Citation.]" (*Salas*, *supra*, 198 Cal.App.4th at p. 1070.)

III. Evidentiary Rulings

We do not consider on appeal any evidence as to which the trial court has sustained evidentiary objections unless the party against whom the trial court ruled demonstrates on appeal that the ruling was improper. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 (*Bozzi*); *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*).)

Although an appellate court reviews de novo a trial court's decision to grant summary judgment, the weight of authority holds that the appellate court reviews the trial court's evidentiary rulings under an abuse of discretion standard. (*Carnes v. Superior Court of Placer County* (2005) 126 Cal.App.4th 688, 694.) The State candidly acknowledges case law questioning whether abuse of discretion or de novo review is the proper standard where evidentiary rulings are based on paper submissions alone. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255.)

For purposes of this appeal, the two standards are equivalent, because plaintiff mainly argues the trial court made evidentiary rulings based on "incorrect assumptions of law." If a trial court's evidentiary ruling is based on a misinterpretation of law (which presents a question of law subject to de novo review), abuse of discretion has been shown.

(*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1403.)

Plaintiff's brief challenges the trial court's evidentiary rulings excluding major portions of her expert's declaration and the prior accident reports. However, the basis for most of the challenges is plaintiff's claim that the trial court made two "incorrect assumptions of law" in interpreting the evidence. As we will explain, plaintiff misapprehends what happened in the trial court.[8]

Plaintiff also claims the trial court improperly excluded her expert's opinion as to the existence of a dangerous condition at or near the crosswalk. She cites authority that stands for the general propositions that an expert opinion can be "dismissed" only if it is speculative, lacks foundation, or lacks certainty, and that evidence opposing summary judgment should be liberally construed. However, while the trial court found many foundational problems with the expert's declaration, including the requirement that evidence of prior accidents must be substantially similar to be admissible, the court went on to say that, "even if admissible, these opinions and conclusions are insufficient to create a triable issue of material fact,"

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[8] The State in its respondent's brief defends the trial court's evidentiary rulings, e.g., excluding prior accident reports on hearsay grounds. We need not address each ruling because as we discuss *post*, (1) plaintiff's evidentiary challenges are based on an apparent misunderstanding of what the trial court did; and (2) even if we consider plaintiff's evidence, she still fails to show a triable issue of material fact.

because the expert's declaration had little relevance to the one issue raised by the motion "but more importantly, even if admissible, the declaration is itself undermined by Plaintiff's own admissions in response to Defendant's separate statement of facts."

Plaintiff fails to show abuse of discretion warranting reversal. "[E]xpert opinions on whether a given condition constitutes a dangerous condition of public property are not determinative: '[T]he fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court's statutory task, pursuant to . . . section 830.2, of independently evaluating the circumstances.' [Citation.]" (*Sun*, *supra*, 166 Cal.App.4th at p. 1189.)

We see no evidentiary error.

IV. Dangerous Condition of Public Property

According to plaintiff, the defect in the physical condition of the State's property was the "'distracting and confusing' configuration of the intersection which immediately preceded the crosswalk in which she was injured, which combined with the negligence of Branch and others caused her injuries." Plaintiff contends the trial court, in granting summary judgment, made two "incorrect assumptions of law" -- (1) that a "dangerous condition of public property" could be established *only* by the occurrence of "prior similar accidents," and (2) that a dangerous condition of public property cannot exist unless "all" parties were using the public property with "due

care." (Second italics omitted.) We will explain that plaintiff misconstrues the trial court's ruling, which properly applied the law.

A. Prior Similar Accidents

Plaintiff argues the trial court's first "incorrect assumption of law" was to assume that the existence of prior similar accidents is a *prerequisite* to finding a dangerous condition of public property. However, plaintiff does not point to anything in the record suggesting the trial court held this view.

Plaintiff claims the State argued in the trial court that the absence of similar accidents proved as a matter of law that any risk was insignificant, and therefore the property was not dangerous. We agree with the State that plaintiff distorts the State's argument. The State argued that its own evidence showed the absence of prior similar accidents, that plaintiff failed to refute that evidence and that the absence of similar accidents established that the risk associated with the property was insignificant for "dangerous condition" purposes.

In any event, regardless of the State's view, plaintiff fails to show *the trial court* adopted an erroneous interpretation of the law. The cited ruling shows the trial court said plaintiff's evidence of past accidents "do[es] not establish the requisite 'substantial similarity' to be admissible to show a dangerous condition, particularly since none tends to show the intersection was either 'distracting [or]

confusing' as claimed by [plaintiff]." "It is well settled that before evidence of previous accidents may be admitted to prove the existence of a dangerous condition, it must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question. [Citations.]" (*Salas*, *supra*, 198 Cal.App.4th at p. 1072.) Indeed, as this court observed in *Salas*, "a stricter degree of substantial similarity is required when other accident evidence is offered to show a dangerous condition; '"the other accident must be connected in some way with that thing . . . ."' [Citation.]" (*Ibid.*; see also *Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 137-138 [cited *Salas* with approval in concluding dissimilar accidents provided no evidence of dangerous condition].

Thus, in ruling on the admissibility of plaintiff's evidence of other accidents, the trial court merely ruled, correctly, that to be relevant, prior accidents must be substantially similar. The trial court did not say that public property cannot be found dangerous absent prior accidents.

The trial court's ruling is consistent with the law. In determining whether a given condition of public property is minor or insignificant as a matter of law, one of the factors the court should consider is whether "'other persons have been injured on this same defect.'" (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.) This court said in *Lane* that "the absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous.' (See,

e.g., *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 482 [inquiry into the question of dangerousness involves consideration of such matters as whether the condition has been the cause of other accidents]; *Sambrano*[, *supra*,] 94 Cal.App.4th [at p.] 243 [evidence of the lack of prior accidents is relevant to the definition of a dangerous condition under § 830, subd. (a)].)" (*Lane*, *supra*, 183 Cal.App.4th at p. 1346.) Thus, while not dispositive on the issue of the existence of a dangerous condition, the absence of prior similar accidents is a relevant consideration. (*Salas*, *supra*, 198 Cal.App.4th at p. 1071.)

Plaintiff claims that at least two prior accidents were similar in that motorists rear-ended vehicles which had stopped for pedestrians crossing at the subject crosswalk. It must be obvious that these accidents are dissimilar. No bicyclist or pedestrian was struck by a car in the crosswalk. (See *Salas*, *supra*, 198 Cal.App.4th at p. 1073 ["none of the proffered accidents even involved a pedestrian, much less a pedestrian who stopped while crossing the street and then changed direction. . . . [T]he trial court did not abuse its discretion in ruling the traffic collision reports were inadmissible because they were not substantially similar."].) One of the two accidents occurred on the opposite side of SR 36 from the location where plaintiff was struck by Branch. Moreover, even assuming for the sake of argument that such evidence was admissible, plaintiff fails to show any condition of the property caused those accidents. Neither offending driver

claimed to be distracted by a confusing intersection. In one, the driver stated he was looking at his speedometer and did not see the vehicle ahead of him stop. In the other, the driver was looking behind her as she changed lanes and did not see vehicle ahead of her stop.

Even assuming for the sake of argument that two of the prior accidents could be considered similar to this accident, it does not show a dangerous condition, "given the high traffic volume that has passed through the intersection without incident." (*Mixon, supra*, 207 Cal.App.4th at p. 138.) Here, the State's expert attested that between 1998 (the earliest date available on the State's database) and this 2006 accident, no other pedestrian or bicycle accidents had occurred at or near this crosswalk, yet over 16 million vehicles drove through the subject location.

Plaintiff fails show that the trial court made an error of law regarding prior accidents.

B. Due Care

Plaintiff argues the trial court's second "incorrect assumption of law" was the court's conclusion that a dangerous condition of public property cannot exist unless *all* parties were using the property with due care. Again plaintiff misinterprets the State's position and the trial court's ruling.

Plaintiff relies on case law that a plaintiff need not prove the property was actually being used with due care at the time of the accident, and negligence by a third party will not relieve a public entity of liability for a dangerous

condition of public property. For example, in *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, the court said, "if the condition of [the State's] property creates a substantial risk of injury even when the property is used with due care, the state gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury." (*Ducey*, *supra*, at pp. 718-719, citing, inter alia, *Mathews v. State of California* (1978) 82 Cal.App.3d 116, 121 [third party's negligence does not negate existence of a dangerous condition].) "When a plaintiff seeks to recover for injury caused by a dangerous condition of public property, '"The Tort Claims Act does not require [the] plaintiff to prove that the property was actually being used with due care at the time of the injury, either by himself or by a third party . . . ."'" (*Lane*, *supra*, 183 Cal.App.4th at p. 1347.) Rather, a condition is dangerous if it creates a substantial risk of harm when used with due care by the public generally, as distinguished from a particular person charged as a concurrent tortfeasor. (*Lompoc Unified School Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1698 (*Lompoc*); *Mathews, supra,* 182 Cal.App.3d at p. 121.)

Here, the trial court did not rule that plaintiff was required to prove due care; nor did it rule that Branch's negligence relieved the State of liability. Rather, the trial court ruled, in accordance with the law, that the undisputed facts established the State's property did not pose a

substantial risk of injury when used with due care. (§ 830, subd. (a).)

Plaintiff cites the trial court's ruling that, even if the court were to consider the conclusory opinion of plaintiff's expert that this intersection was "unique and complex," there was still no showing that such a unique and complex intersection, with its alleged increase in potential congestion and pedestrian-related traffic interactions, posed a substantial risk of injury when used with due care. Further, plaintiff cites the trial court's ruling that the undisputed facts -- including the facts that there was no obstruction to the motorist's view of the bicyclist and the driver *behind* Branch saw the bicyclist -- "lead to only one reasonable conclusion: When due care is exercised, the intersection did not pose a substantial risk of injury." Evidence that another driver was able to see plaintiff established that there is no substantial risk of harm when SR 36 is used with due care by the public generally. (*Sun*, *supra*, 166 Cal.App.4th at p. 1190 [based on the fact that another motorist stopped for the plaintiff as plaintiff crossed the street in the crosswalk, "[i]t thus appears that a reasonably careful motorist would have had no difficulty seeing a pedestrian (or in seeing a car that was stopped for a pedestrian) and stopping, which further supports the conclusion that the configuration of the subject crosswalk did not create a substantial risk of injury when used with due care"].) The court's rulings here accurately reflect the law and were not erroneous.

C. Adjacent Property

Plaintiff argues the conditions on *adjacent* property, i.e., the presence of a gas station between two county roads that intersect SR 36 at odd angles, made the *State's* property unsafe. We have no quarrel with the principle that public property may be considered dangerous if a condition on adjacent property exposes those using the public property to a substantial risk of injury. (Cal. Law Revision Com. com., reprinted at 32 West's Ann. Gov. Code (2012 ed.) foll. § 830, p. 7.) However, that is not the case here.

Plaintiff quotes from *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 804, which held that if third party negligence is foreseeable, the third party's conduct may be the very risk which makes the public property dangerous when considered in conjunction with some particular feature of the public property such as lack of a fence or barrier. However, *Swaner* involved a demurrer, which required the court to assume the truth of the plaintiff's allegations that the city knew that third parties were illegally driving vehicles onto a beach from a parking lot, injuring people on the beach. (*Id.* at p. 806.) *Swaner* held "these allegations, if proved, may provide a sufficient level of foreseeability so as to render the condition of the beach a proximate cause of appellants' injuries." (*Ibid.*) However, *Swaner* continued: "It may well be that respondents will successfully show on a motion for summary judgment that appellants have no evidence to support these allegations [and] successfully move for summary

judgment . . . ." (*Ibid.*) That is exactly what happened here. *Swaner* does not help plaintiff in this appeal from summary judgment.

Moreover, the mere foreseeability that motorists may be distracted does not create a dangerous condition. It is the motorist who has the duty not to be distracted from the safe operation of the vehicle. (*Lompoc*, *supra*, 20 Cal.App.4th at pp. 1694-1695.) In *Lompoc*, the Court of Appeal issued a writ directing the trial court to grant summary judgment in favor of a school district in a complaint by a bicyclist injured by a motorist distracted by a football game held on the district's property. The appellate court rejected the plaintiff's argument that the district, by trimming a hedge that previously blocked the passing public's view of the football field, had created a foreseeable risk that motorists traveling on the adjacent street would be distracted by athletic events and become involved in traffic accidents. (*Id.* at pp. 1691, 1696-1697.) There was no physical defect on or adjacent to public property. (*Id.* at p. 1697.) "[A] public entity should not be liable for injuries resulting from the use of a highway--safe for use at 65--at 90 miles an hour, even though it may be foreseeable that persons will drive that fast. The public entity should only be required to provide a highway that is safe for reasonably foreseeable *careful* use." (4 Cal. Law Revision Com. Rep. (1963) p. 822, original italics.)

Plaintiff argues *Lompoc* is distinguishable, because here part of the distraction occurred on SR 36 itself, i.e., the

driver of the pickup truck, Stephen Graffweg, was on westbound SR 36 and was "attempting" to turn left onto Aspen Street when he discovered his path blocked by the logging truck. However, Graffweg had already turned off SR 36 and was on the gas station premises when Branch struck plaintiff.

As the State points out, plaintiff's theory is similar to the theory advanced in *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434. In *Brenner*, the Court of Appeal upheld dismissal upon demurrer to a complaint alleging a busy city intersection constituted a dangerous condition because one of the streets had been widened to accommodate more traffic and because adjacent to the intersection there was a bus stop, a park, a convenience store, and a middle school, all of which combined to pose a risk to pedestrians crossing the street. (*Id.* at pp. 437-438, 440.) The court held that these conditions did not permit a finding of a dangerous condition in the absence of some additional allegation that the physical characteristics of the street created a substantial risk that a driver using due care while traveling along the street would be unable to stop for pedestrians who were using due care while crossing at the intersection. The court went on to observe that the complaint contained no allegation that the street had "blind corners, obscured sightlines, elevation variances, or any other unusual condition that made the road unsafe when used by motorists and pedestrians exercising due care." (*Brenner*, *supra*, 113 Cal.App.4th at pp. 440-441.) As the trial court noted, no such defects exist here.

Plaintiff cites her expert's testimony concerning the alleged existence of 26 different potential turning movements at the intersections on SR 36. Aside from the fact that there were not 26 different turning movements being executed by vehicles at the time of the accident, here the mere existence of many potential traffic interactions at that location does not constitute a dangerous condition of public property. Motorists are routinely exposed to a variety of distractions. Imposing liability in this case would subject public entities to litigation for nearly every accident that occurs at every four-way intersection, as well as many other intersections throughout the state.

In *Mixon*, a case published while this appeal was pending, a pedestrian, injured by a motorist in a marked crosswalk, argued the State had created a dangerous condition by placing a distracting "signal ahead" sign and roadway marking which focused motorists' attention on the upcoming intersection beyond the intersection where the accident occurred. (*Mixon, supra*, 207 Cal.App.4th at p. 135.) *Mixon* affirmed summary judgment in favor of the State. "[E]very warning sign necessarily directs a driver's attention to one thing among multiple things. . . . *It remains the driver's duty to attend to the roadway as a whole*." (*Id.* at p. 136, italics added.)

Plaintiff relies on *Bonanno,* which upheld a jury verdict against a county transit agency in favor of a pedestrian who was struck by a car while crossing the street to reach a bus stop established by the transit agency. The bus stop could be

considered dangerous, in that a hazard on the *adjacent* property (the crosswalk at an uncontrolled intersection) exposed those using the bus stop to a substantial risk of injury. (*Bonanno*, *supra*, 30 Cal.4th at p. 149.) Plaintiff here contends the crosswalk was a dangerous condition because of its relationship to its surroundings, i.e., the intersection.

However, the Supreme Court emphasized that its decision in *Bonanno assumed* the crosswalk was dangerous. (*Bonanno*, *supra*, 30 Cal.4th at pp. 146-147.) The court in *Bonanno* also made clear it did not address the requirement of a "substantial (as distinguished from a minor, trivial or insignificant) risk of injury" under section 830, which "may pose an insuperable burden to a plaintiff claiming the location of public property rendered it dangerous." (*Bonanno*, *supra*, at p. 154.) *Bonanno* reiterated that public entity liability lies under section 835 only when a feature of the public property has "'increased or intensified'" the danger to users from third party conduct. (*Bonanno*, *supra*, at p. 155.) This distinction was recognized in *Brenner*, *supra*, 113 Cal.App.4th at page 442, and here, as in *Brenner*, we do not assume the crosswalk was dangerous.

At oral argument, plaintiff argued the State should have moved the crosswalk further away from the intersection, as opined by her expert as follows:

"It is the definite opinion of the declarant that the present location of the crosswalk, so close to the complex intersections and numerous available vehicle routing patterns constitutes a dangerous condition. Positioning the designated

crossing area at a location where other activities and vehicle positions and movements do not divert the driver's concentration [*sic*]. Further, by increasing the visibility of the crosswalk by use of High Visibility Markings in the crosswalk area as well as activated flashing yellow beacons and actual speed indication signage should have been undertaken by the combined efforts of the State of California and Plumas County long before this accident occurred. An alternate or addition to the above would be the closing off the angle entry/exit point of Martin Way. While the actual pavement markings and signage for the crosswalk could meet the minimum standards as indicated in the Caltrans Traffic Manual and the MUTCD [presumably the Manual on Uniform Traffic Control Devices] as stated by the State's expert, Richard Smith; the problems created at this location deal more with the actual location of the crosswalk itself in consideration of safety for the persons using the crossing itself at that location."

However, the trial court sustained the State's evidentiary objection to that matter, grounded on lack of foundation and opinion based on improper matter. We have rejected, *ante*, plaintiff's general protest to the evidentiary rulings, and plaintiff presents no analysis or authority that this particular evidentiary ruling was improper. We do not consider on appeal any evidence as to which the trial court has sustained evidentiary objections (*Bozzi*, *supra*, 186 Cal.App.4th at p. 761), unless the party against whom the court ruled demonstrates on appeal that the ruling was improper (*Bozzi*,

supra, 186 Cal.App.4th at p. 761; *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785).)

Even if we were to consider the expert's opinion, it does not save plaintiff's case. It contains an incomplete sentence: "Positioning the designated crossing area at a location where other activities and vehicle positions and movements do not divert the driver's concentration [*sic*]." The expert does not say whether repositioning is something that he believes should be done. The expert goes on to speak about visibility of the crosswalk, which we know was not an issue in this accident. Even assuming the expert meant to state an opinion that the crosswalk should be moved, the State does not have a duty to position a crosswalk at a location where other activities and vehicle positions and movements do not divert the driver's concentration. As we have already explained, motorists are routinely exposed to a variety of distractions. Imposing liability in this case would subject public entities to litigation for nearly every accident that occurs at every four-way intersection, as well as many other intersections throughout the state.

There was no evidence raising a triable issue of fact as to any physical characteristic of the property that created a substantial risk that a driver using due care while traveling along SR 36 would be unable to stop for pedestrians who were using due care while crossing at the crosswalk. We conclude the trial court properly entered summary judgment in favor of the State.

DISPOSITION

The judgment is affirmed. The State shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.

STATE OF CALIFORNIA
FACTUAL DIAGRAM
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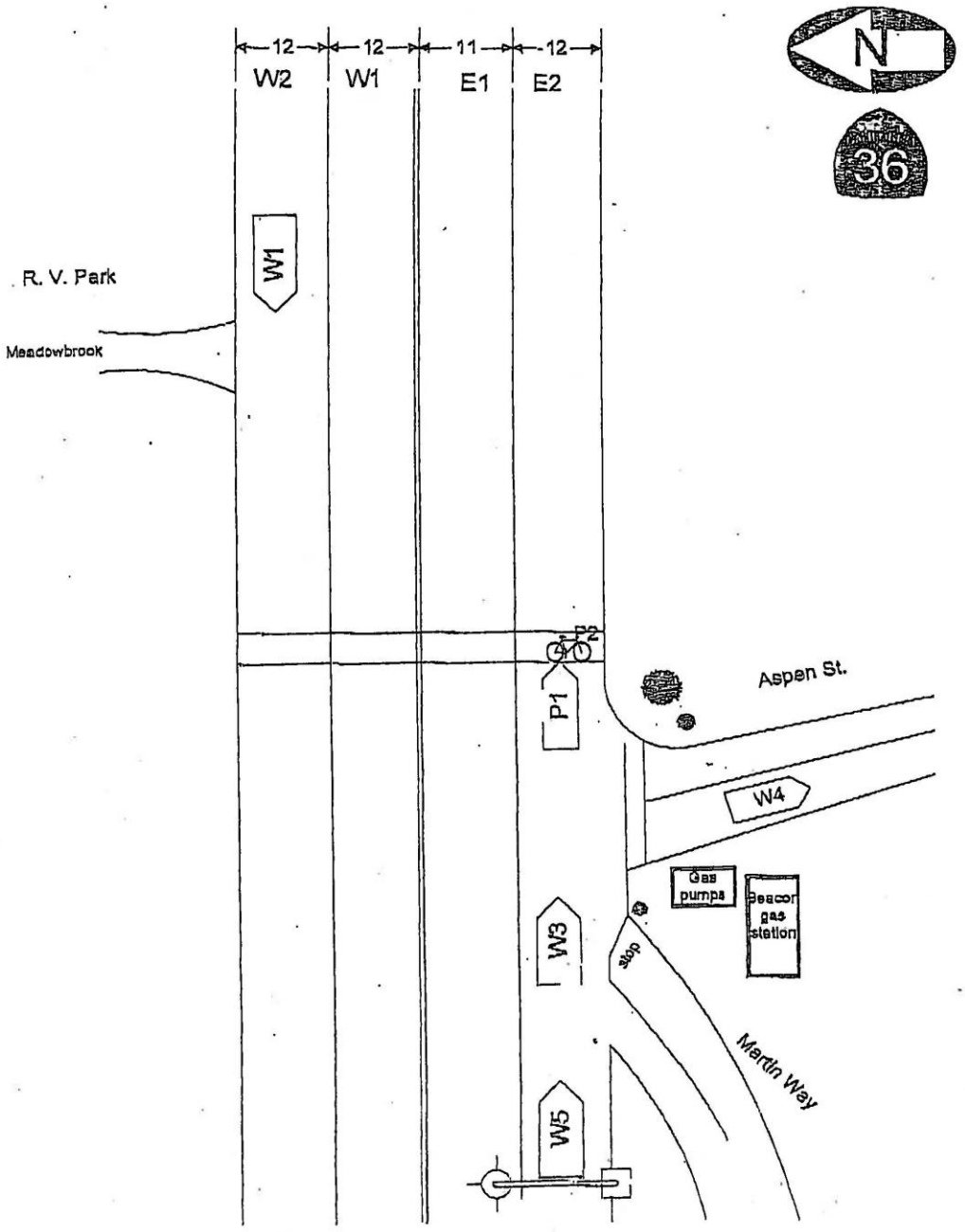
DATE OF INCIDENT	TIME	NCIC NUMBER	OFFICER I.D.	NUMBER
10/10/2006	1655	9140	11682	

ALL MEASUREMENTS ARE APPROXIMATE AND NOT TO SCALE UNLESS STATED (SCALE=)



PREPARED BY	I.D. NUMBER	DATE	REVIEWER'S NAME	DATE
R. H. WASHABAUGH	010823	1-10-07	R. WASHABAUGH	1-10-07